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No. 94-1719

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1994

MountainWest Financial Corporation,

Petitioner,

v.

VISA U.S.A. Inc.,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE AMERICAN FINANCIAL SERVICES ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF OF THE AMERICAN FINANCIAL SERVICES ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

The American Financial Services Association (AFSA) respectfully moves, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amicus curiae* in support of petitioner. Petitioner has consented to the filing of this brief. This motion is necessitated because counsel for respondent Visa U.S.A. Inc. has refused consent, despite the fact that AFSA participated in this case as *amicus curiae* in the Court of Appeals for the Tenth Circuit.

AFSA is the nation's largest trade association representing nonbank providers of financial services, including credit card

services. Its members include more than 450 companies that provide a total of approximately $190 billion of consumer credit in the United States. Their typical customer is younger and less wealthy than the typical customer who is able to borrow money from a bank. The members of AFSA range from small, independently owned consumer finance offices to the consumer financial services affiliates of some of the nation's largest financial, retail, and automotive corporations. Many of AFSA's members are members of Visa and issue VISA cards.

AFSA has a history of commitment to free entry and open competition in the marketplace for consumer credit and financial services. AFSA was founded in 1916 as the American Association of Small Loan Brokers, with the avowed purpose of ensuring a ready market for small cash loans to individuals, households, and small businesses. Over the ensuing decades, the members of the association that has come to be known as AFSA have directly served the credit needs of consumers and small businesses by providing both secured and unsecured loans. They have done so by emphasizing personal service and by adopting innovative approaches that have filled the vacuum when other segments of the financial services industry failed to address the individualized credit needs of average citizens and small businesses. In pursuing this mission, AFSA often has had to confront the efforts of banks to secure unwarranted legal protection against nonbanks in areas that the banks consider to be their traditional markets.

Consistent with its pro-competition and pro-consumer mission, AFSA has a direct and immediate interest in the antitrust issues raised in this case, and participated as *amicus* in the court below. The proper resolution of these issues is obviously of central importance to the credit card industry, and will have substantial consequences for the larger consumer finance industry, in which credit card financing plays a growing part. In addition, the ultimate resolution of the antitrust issues at stake in this case undoubtedly will have a profound influence on the future shape of the entire financial services industry. AFSA believes that this case

provides an important opportunity to lay down a clear and sound statement of the applicable principles of antitrust law that will guide business practices in these important industries over the years ahead. Because of the distinct perspective that AFSA brings to these issues, and because of AFSA's strong interest in these issues, we respectfully move for leave to submit the attached brief to assist the Court in its determination whether to grant further review.

Respectfully submitted,

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May 19, 1995

QUESTIONS PRESENTED

1. In order to be ancillary under the rule of reason, must a joint venture's restraint of trade be: (a) reasonably related to the venture's business interests, irrespective of efficiencies; (b) reasonably necessary to enhance the venture's efficiencies; or (c) the least restrictive alternative to enhance the venture's efficiencies?

2. In evaluating a joint venture's restraint of trade under the rule of reason, is the market power of the venture: (a) an important factor but not a threshold requirement; (b) a threshold requirement, which can be satisfied by a showing that the venture members possess a large collective market share and that the venture can disadvantage competitors; or (c) an elevated threshold requirement, which disregards large collective market share and requires a showing that exclusion from the venture effectively entails exclusion from the relevant market?

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BRIEF OF THE AMERICAN FINANCIAL SERVICES ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The interest of the *amicus curiae* is set forth in the motion accompanying this brief.

REASONS FOR GRANTING THE WRIT

As they enter the information age, American businesses need antitrust rules that are clear and that also ensure that entrenched interests cannot erect barriers to innovative and efficient competition. The decision below in this case deepens the confusion confronting businesses in a crucial area of antitrust law, and announces a legal rule that ignores a wide range of anticompetitive conduct that could block the efficient production and lower prices that consumers value.

The pernicious effects of the Tenth Circuit's decision, if left unreviewed, are substantial. Departing from previous circuit court cases, the court adopted an extremely lenient test to validate exclusionary conduct by a network joint venture. Firms throughout the fast-growing financial services industry are increasingly turning to network ventures to produce efficiently such new products as "debit cards" and at-home banking. Because such ventures face a variety of conflicting antitrust standards across the country, the financial services industry has long viewed this high-profile case as a landmark. The Tenth Circuit's wrong-headed analysis thus has the potential to shape a generation of business practices throughout the financial services industry.

Visa's exclusionary bylaw has prevented firms in the financial services industry, including AFSA members such as Dean Witter and others, from pursuing a competitively effective strategy of issuing both a VISA card and a proprietary card. The bylaw creates no efficiency but merely allows Visa's large members to protect their current market shares and maintain higher prices than would otherwise prevail. In validating the restraint as a matter of law, the Tenth Circuit applied a threshold market power standard that ignored a broad category of anticompetitive conduct. Specifically, the court's analysis failed to recognize that exclusionary conduct aimed at restraining the effectiveness of competition by an existing competitor can harm consumers just as much as can direct restraints on price.

This incomplete understanding of market power reflects the pervasive confusion among the lower courts regarding the proper definition and role of market power. This confusion has led to openly conflicting results and has stymied businesses' efforts to adapt to new economic challenges through innovative business alliances. In this environment, the Tenth Circuit's misguided analysis has vast potential to do mischief.

AFSA therefore respectfully urges that the Court grant petitioner's Petition for a Writ of Certiorari.

I. THE DECISION BELOW RAISES ANTITRUST ISSUES OF SUBSTANTIAL IMPORTANCE FOR THE ENTIRE FINANCIAL SERVICES MARKET.

AFSA believes this case has established that Visa's discriminatory policy of excluding issuers of competitive non-VISA credit cards and expelling any members of the Visa network that introduce competitive non-VISA cards serves no purpose other than the suppression of competition. AFSA therefore agrees with the unanimous jury verdict, sustained by the District Court, that Visa's discriminatory policy of selective exclusion -- as embodied in Bylaw 2.06 and Bylaw 2.10(e) adopted by the Visa board of directors -- causes substantial harm to competition and consumers and is not justified by any substantial beneficial effects on competition. *See* Pet. App. 37a-38a; *see also id.* at 27a-106a. Since Visa is a network joint venture, whose efficiencies are based on open access, Visa's anticompetitive restraint is unjustified. Allowing other financial institutions to compete as Citicorp does, by creating competitive non-VISA cards while also competing within the Visa network, can only increase the efficiency, diversity, and availability of credit card services, thereby promoting consumer welfare by offering more choices, greater competition, and lower prices.

Visa was well aware at the time it enacted Bylaw 2.06 that its restraint of trade would have a sweeping impact in the credit card market. At the Board meeting where the Bylaw was passed,

Visa compiled a list of firms throughout the United States that are potential issuers of competing proprietary cards and thus are possible future targets of Visa's Bylaw. The list includes over 100 major nonbank companies, some of whom already were issuing VISA cards. Fifteen of the listed companies are AFSA members. Visa's Board apparently is prepared to exclude or expel any or all of these companies if they choose to offer a competing proprietary card. While more of the listed companies have begun issuing credit cards since the Bylaw was enacted, in every case they predictably have responded to its exclusionary threat by opting for a VISA and/or MasterCard card; none of the listed companies has introduced a new proprietary card.

The anticompetitive impact of Visa's artificial restraint is growing and ultimately will affect the entire financial services industry. In the case of Dean Witter, for example, not only does Visa's Bylaw preclude it from following Citicorp's desirable business strategy of offering multiple proprietary cards and association cards, but the Bylaw also is likely to inhibit severely the growth of Dean Witter's recently announced NOVUS network. According to published reports, following its victory at trial in this case, Dean Witter made a substantial investment to transform its nationwide merchant network (built initially for Discover Card) into the newly named "NOVUS network," which can support not only the Discover Card but also other proprietary cards, including cards issued by both Dean Witter and other card issuers. But for Visa's Bylaw 2.06 (and its companion, Bylaw 2.10(e)), the NOVUS network would be a viable and attractive option for firms (including existing Visa members) that are interested in introducing new competing proprietary cards. In light of the Tenth Circuit's reversal, however, the attractiveness of the network to other firms is severely limited since the penalty for issuing a proprietary card is exclusion or expulsion from the Visa network. AFSA also understands that American Express has expressed interest in making its merchant network available for proprietary cards issued by other firms (including existing Visa members), but is similarly stymied by Visa's exclusionary Bylaw.

The contrast in competitive terms between a marketplace with or without Visa's Bylaw is clear. As long as the anticompetitive Bylaw is allowed to remain on the books, all firms (other than Citicorp) will be forced to choose between issuing either bank association cards or proprietary cards. No firm (again, other than Citicorp) will be able to offer both types of cards, even though the evidence presented at trial in this case showed compellingly that for many firms such a multicard strategy is the most efficient means of competing in this market. Except for the two firms that began issuing proprietary cards before Bylaw 2.06 was passed (Dean Witter and American Express), no firm is likely to choose the proprietary card route in the future. (One can only wonder whether, in the long term, Dean Witter and American Express will re-evaluate their own card-issuing strategies.) Dean Witter's ability to transform the NOVUS network into a viable competitor against the powerful Visa and MasterCard networks by attracting other card issuers will be severely hampered. The same will be true with respect to American Express. The predictable result will be fewer cards and reduced network competition, and thus higher prices and less choice for consumers.

Equally troublesome is the potential impact of the decision below on other facets of the financial services industry. The past few years have seen the introduction of new products and services, such as debit cards and ATM machines, which are offered to consumers using the same kinds of network services that are used to provide credit cards. More new network-oriented financial products and services, such as electronic home banking and electronic commerce on the Internet, are on the way. The message of the Tenth Circuit's widely noted decision in this case is that powerful networks are permitted to engage in exclusionary practices that will protect their dominant positions while artificially limiting consumer choice and maintaining higher prices. That is a dangerous message that undermines the basic purposes of the antitrust laws. Already, antitrust challenges to exclusionary practices involving ATM machines have been brought by the Justice Department, with results that stand in marked contrast to the decision below and that would not have

been upheld under the Tenth Circuit's analysis. *See, e.g., United States v. Electronic Payment Services, Inc.*, 1994-2 Trade Cas. (CCH) ¶ 70,796 (D. Del. Oct. 14, 1994) (consent decree in government enforcement action provides that defendant ATM network cannot prevent member banks from being affiliated with other ATM networks). It is thus of the utmost importance for the lower courts to have clear guidance now on the proper approach under the antitrust laws for assessing the legality of exclusionary practices such as those at issue here.

In short, AFSA believes that the ultimate precedent left to stand in this case will be a landmark that shapes business practices throughout the financial services industry. The tremendous importance of this case for the national economy makes it a worthy candidate for plenary review.

II. THIS CASE PRESENTS AN OPPORTUNITY TO CLARIFY THE CENTRAL ISSUE OF MARKET POWER IN EXCLUSION CASES BY RECOGNIZING THE IMPORTANCE OF EXCLUSIONARY MARKET POWER.

The central problem with the market power approach taken by the court below and by many other lower courts is that it fails to account for the nature and importance of exclusionary market power. As a result, in cases that involve antitrust challenges to exclusionary conduct, these courts are generally unable to make a proper evaluation of conduct that in fact creates or exercises this type of market power.

"Exclusionary market power" can be defined as the ability of a firm (or group of firms) to raise price above the competitive level or prevent it from falling to a lower level by acting in ways that raise the costs of rival firms and thereby cause those competitors to restrain their output. In such circumstances, the actions of the first firm have effectively excluded competition by its rival firms by rendering that competition less effective, with resulting harm to consumers. *See, e.g.*, JOE S. BAIN, INDUSTRIAL

ORGANIZATION 324-30 (1959); ROBERT H. BORK, THE ANTITRUST PARADOX 156 (1978). There are a variety of situations in which exclusionary market power can be exercised against competitors in this manner. *See, e.g.*, T. Krattenmaker & S. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209, 223-49 (1986) (describing situations in which firms are able, by adopting exclusionary practices, to exercise exclusionary market power at the expense of consumers and competitors) [hereafter *Anticompetitive Exclusion*]; S. Salop & D. Scheffman, *Raising Rivals' Costs*, 73 AM. ECON. REV. 267 (1983).

Exclusionary market power contrasts with the "classical" market power that is exercised when a firm or group of firms is able to control price profitably in a particular market by directly restraining their own output. Classical market power is exercised in circumstances where firms can increase profits simply by reducing the volume of their own output, where the revenue forgone from the reduction in sales volume is more than compensated by the revenue that is gained by the concomitant increase in price. *See generally* GEORGE J. STIGLER, THE ORGANIZATION OF INDUSTRY (1968); W. Landes & R. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937 (1981).

In this case, the District Court properly recognized that Visa exercised exclusionary market power when it excluded Dean Witter from the Visa venture. Specifically, the District Court concluded that Visa prevented Dean Witter (and other rival firms such as AFSA's members) from expanding output, where that expansion would have enabled Dean Witter and other firms to compete more effectively and strengthen price competition by offering both an association card (the VISA card) and a proprietary card (such as the Discover Card) to consumers. *See* Pet. App. 72a-76a.

In reversing, the Tenth Circuit failed to understand the nature and anticompetitive potential of exclusionary market power. As a result, the court adopted an unjustifiably narrow view

of what constitutes "market power," holding that unless a joint venture's exclusionary conduct deprives the plaintiff of access to "essential facilities," and thus results in the complete ouster of the plaintiff from the relevant market, then the challenged practices cannot constitute an exercise of collective market power. Pet. App. 25a. Moreover, the court treated the existence of market power (narrowly defined in this way) as a threshold test in determining whether a viable Section 1 claim exists. *See id.* at 13a.[1] The overall effect of the court's market power approach was thus to cut off any meaningful scrutiny of Visa's exclusionary practices and effectively to validate Visa's Bylaw 2.06 as a matter of law.

This central flaw led the court below -- and has similarly led other courts -- into four distinct legal errors. The frequent repetition of these errors continues to condemn many legitimate antitrust suits to failure, as a matter of law, based on similarly narrow conceptions of what constitutes the kind of market power that is cognizable in exclusion cases.

First, the court below treated market power as a threshold inquiry that is to be addressed, in isolation, before considering the probable anticompetitive effects of the challenged conduct. This approach might be proper for certain cases that involve only classical market power, but it plainly is not adequate in cases that involve exclusionary market power. The exercise of exclusionary market power can take a great many forms, and its existence cannot generally be revealed except by a careful evaluation of the conduct by which it is exercised. *See Anticompetitive Exclusion, supra*, at 223-49. In these cases, furthermore, it "is the exclusionary conduct that creates the market power being evaluated, not the other way around." T. Krattenmaker, R. Lande & S. Salop, *Monopoly Power and Market Power in Antitrust Law*,

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[1] In this regard, the court below simply accepted the invitation posed by Visa, which asked the court to hold that market power "is a threshold requirement under the rule of reason" and "[i]n the absence of such power, there is . . . no reason to inquire further." App't 10th Cir. Br. 42.

76 GEO. L.J. 241, 255 (1987) [hereafter *Market Power*]. Consequently, treating market power as a threshold issue which must be evaluated *before* considering evidence relating to impact of the exclusionary conduct effectively grants antitrust immunity to a wide range of anticompetitive actions. As described in Section IV of this brief, however, the lower courts are divided on this issue and the Supreme Court has not clearly addressed it.

Second, in requiring evidence that prices were increased above some initial or previous level, the court below did not take proper account of exclusionary market power -- failing to appreciate that, in cases of exclusionary market power, the competitive harm is often the *prevention of prices from falling to new, lower levels*. Thus, the court below concluded that there was no evidence of actual anticompetitive effect because no price increase occurred after Visa adopted its exclusionary bylaw. Pet. App. 19a. However, preventing price declines is precisely the kind of anticompetitive effect that is often intended and achieved by such exclusionary conduct, and the harm to consumers may be just as significant in markets where higher prices are maintained as in other markets where prices are increased by similar conduct. Indeed, this is particularly likely to be the case where, as in the credit card market, vastly improved technology has created sharp decreases in input costs, but exclusionary conduct "can delay or prevent prices from falling altogether by preventing the entry or raising the costs of more efficient [or more aggressive] potential competitors." *Market Power*, *supra*, at 258. Had the court below fully appreciated the nature and importance of exclusionary market power, it could not have dispensed so cavalierly with the trial record and jury finding of substantial anticompetitive effect.[2]

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[2] The approach taken by the court below and by many other lower courts, which fails to recognize the importance of the potential for the exercise of market power to prevent price decreases, reflects an apparent ambiguity in the definition of "market power" that this Court formulated in *NCAA*, phrased as "the ability to raise prices above those that would be charged in a competitive market." *NCAA v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 109 n.38 (1984). If the emphasis in this passage is

Third, to the extent that the court below considered the issue of exclusion at all, it failed to appreciate that *restraining the expansion of a rival* can harm consumers even if the rival remains a viable but less effective competitor in the market. As noted in Section IV of this brief, in some of its recent decisions the Seventh Circuit has taken this same position, which has otherwise been rejected by other lower courts. Yet this extremely narrow view of what constitutes cognizable market power in exclusionary conduct cases is wholly incorrect when the concept of exclusionary market power is factored into the analysis. Whether or not the challenged practice succeeds in entirely excluding the plaintiff from the relevant market, or even is intended to do so, is less to the point than whether the practice imposes a substantial competitive disadvantage upon the plaintiff and other competitors by raising their costs. *See, e.g., Market Power, supra*, at 248-52. In line with this more comprehensive economic analysis, the Court's decisions have allowed rivals to challenge exclusionary practices even though the plaintiffs remain profitable sellers in the market. *See Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 528 (1983) ("An agreement to restrain trade may be unlawful even though it does not entirely exclude its victims from the market."); *see also Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

Fourth, the court below improperly focused on the "atomistic" structure of the joint venture's membership rather than considering the members' collective market share and other factors that bear upon their collective market power. Again, consideration of the concept of exclusionary market power reveals the court's error in this regard. When a joint venture excludes

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placed upon the phrase "raise prices," then the formulation used by the court below would appear to be correct. If the emphasis instead is placed upon the potential gap between actual price and the price that would obtain in a competitive market -- as it should be -- then the formulation recognizes harm to consumer welfare that can flow from conduct that prevents price decreases. This case provides an excellent opportunity for the Court to clear up this apparent ambiguity.

rivals in order to prevent prices from falling, "atomistic" membership structure is irrelevant to the likelihood of anticompetitive harm because the ability of members to raise prices through tacit price collusion is not at issue. By contrast, the venture's large collective market share, and other evidence of its collective ability to disadvantage competitors by excluding them, are highly relevant to the evaluation of exclusionary market power. Such evidence indicates that membership in the venture provides significant competitive benefits, so that exclusion of those that would reduce price will prevent prices from falling.

Thus, if market structure is to be used as a threshold test of a venture's ability to affect price or output through collective exclusionary action, such a test must focus on collective rather than individual market power. One such structural test is a "merger" test, which focuses on whether a merger would be permitted among all the actual members of a venture and all those excluded from the venture. If the competition that would remain after such a merger is so effective that the hypothetical merger would be permitted, then it can be presumed that the venture has neither exclusionary nor classical market power. *See, e.g.*, D. Carlton & S. Salop, *You Keep on Knocking But You Can't Come In: Evaluating Restrictions on Access to Input Joint Ventures*, U. Chi. Working Paper No. 111, at 53-57 (1995).

Alternatively, courts could use a "collective market share" test. Such a test would recognize the fact that a joint venture can control its members' costs and conduct even if the membership is "atomistic" in structure, and would be easier to administer than a merger test. Such a test would, however, permit some exercises of market power that a merger test would not. *Cf. Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 218-21 (D.C. Cir. 1986) (discussing the possible approaches), *cert. denied*, 479 U.S. 1033 (1987). This collective market share approach has been suggested by the federal antitrust enforcement agencies in recent guidelines directed to the health care and intellectual property arenas. *See* U.S. Dep't of Justice & FTC, *Statements of Enforcement Policy and Analytical Principles Relating to Health*

Care and Antitrust, 67 Antitrust & Trade Reg. Rep. at S-12 (Sept. 29, 1994 Supp.); U.S. Dep't of Justice & FTC, *Antitrust Guidelines for the Licensing of Intellectual Property*, 68 Antitrust & Trade Reg. Rep. at S-17 (Apr. 13, 1995 Supp.). The continuing importance of collective market share has also been recognized by courts that have taken seriously the concept of exclusionary market power, such as courts that have confronted similar exclusionary practices in the area of multiple listing services for real estate. *See, e.g., Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1580 (11th Cir. 1991), *cert. denied*, 113 S. Ct. 295 (1992); *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1370-71 (5th Cir. 1980).

In sum, the most common flaw in the divergent approaches that courts take on the issue of market power in cases involving challenges to exclusionary conduct is that they fail to take proper account of the important concept of exclusionary market power. The body of judicial decisions that results from such incomplete analysis will continue to have widespread consequences for antitrust law if the lower courts remain without definitive guidance about how to approach the market power issue in such cases. The Court should take review in this case to clarify the proper analysis of the concept of market power, which is integral in every antitrust case that involves challenges to the validity of various forms of exclusionary conduct.

III. THE TENTH CIRCUIT'S MISGUIDED MARKET POWER STANDARD INFECTED ITS ANALYSIS OF VISA'S PURPORTED JUSTIFICATIONS.

The Tenth Circuit's failure to appreciate the significance of exclusionary market power also runs through its discussion of Visa's asserted justifications, and contributed to the court's failure to scrutinize those assertions more closely. Instead of requiring proof that a joint venture's exclusionary conduct contributes to its efficiency, the court improperly accepted the premise that pursuing profits by disadvantaging rivals is merely vigorous competition that ought to be protected, not questioned, by the

antitrust laws. *See* Pet. App. 21a.

The court below treated Visa's exercise of exclusionary market power as *per se* reasonable on the ground that no business desires to help its rivals. *See* Pet. App. 21a. In doing so, the court failed to recognize the key distinction between pursuing profits by competing efficiently and pursuing profits by limiting the effectiveness of a rival's competition. *See Anticompetitive Exclusion*, *supra*, at 215-30; *Premier Elec. Constr. Co. v. National Elec. Contractors Ass'n, Inc.*, 814 F.2d 358, 369-70 (7th Cir. 1987). The former is legitimately protected by the antitrust laws, but the latter is not. *See, e.g., Aspen Skiing*, 472 U.S. at 605 (where a firm "has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory") (quoting R. BORK, THE ANTITRUST PARADOX, *supra*, at 138). *See generally id.* at 136-60 (discussing proper treatment under antitrust law of conduct that inflicts injury upon rivals). Because it did not make this key distinction, the Tenth Circuit ignored the fact that, as a network joint venture whose efficiency grows by adding new members, Visa was sacrificing its own efficiency in its effort to disadvantage its rivals.

In support of the proposition that disadvantaging rivals is reasonable *per se*, the Tenth Circuit returned to the belief pervading its market power analysis that disadvantaging rivals cannot harm consumers unless the rival firms are completely excluded from the market as a result. Thus, the court accepted Visa's purported justification as a matter of law, stating: "Surely, if [Dean Witter's] goal is to compete more effectively in [the credit card] market, we do not believe this objective constitutes the proverbial sparrow the Sherman Act protects." Pet. App. 25a. To the contrary, as set forth above, such "more effective" competition is a cornerstone of antitrust policy.

Without guidance from this Court, the lower courts will persist in confusion and conflict over the proper legal standard to apply under the rule of reason in evaluating the asserted justifications for exclusionary conduct in joint venture cases. The

decision below presents an excellent opportunity for the Court to provide much-needed guidance on this point as well.

IV. THE DECISION BELOW MERITS REVIEW BECAUSE IT REFLECTS AND PERPETUATES CONFLICTS AMONG THE LOWER COURTS REGARDING THE ROLE AND DEFINITION OF MARKET POWER.

Market power "is a crucial and central issue in almost any complex antitrust case today," and there has been a "widespread and increasing emphasis on the role of market power in antitrust rules." *Market Power*, *supra*, at 243. Nonetheless, as indicated by the forgoing discussion, the courts continue to define and apply the term "market power" in ways "that are both vague and inconsistent," and thus would benefit greatly if the Court were to offer much-needed clarification. *Id.* at 241.

The decision below reflects and perpetuates a conflict among the lower courts on two key issues of market power analysis. First, the courts continue to disagree about the proper role that market power plays in the antitrust analysis of exclusionary conduct under the rule of reason. Second, the courts are split over the proper definition of market power in cases involving exclusionary practices.

The use of market power as a threshold test implicates an important disagreement among the lower courts. Some lower courts, like the Tenth Circuit here, treat market power as a threshold test or "screen" to dispose of cases that do not require meaningful factual scrutiny under the rule of reason. *See, e.g.*, *Ball Memorial Hosp. v. Mutual Hosp. Ins.*, 784 F.2d 1325, 1334 (7th Cir. 1986) ("Market power is a necessary ingredient in every case under the Rule of Reason. Unless the defendants possess market power, it is unnecessary to ask whether their conduct may be beneficial to consumers"); *Oksanen v. Page Memorial Hosp.*, 945 F.2d 696, 709 (4th Cir. 1991) (en banc) (absent "market power, any restraint on trade created by the defendants' actions [in

excluding a physician are] unlikely to implicate" the antitrust laws); *National Bancard Corp. v. Visa U.S.A., Inc.*, 596 F. Supp. 1231, 1258-59 (S.D. Fla. 1984) (market power must be shown to establish a violation under rule of reason analysis), *aff'd*, 779 F.2d 592 (11th Cir.), *cert. denied*, 479 U.S. 923 (1986). The standard practice in such cases is to apply a threshold "market power" test by focusing in isolation on the collective share of the market held by the defendants. *See also* F. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 15 (1984) (advocating use of such a market power "filter" in rule of reason cases).

Other courts, however, have declined to treat market power as a threshold issue in rule of reason cases. *See, e.g., United States v. Brown Univ.*, 5 F.3d 658, 669 (3d Cir. 1993) (in some rule of reason cases, competitive harm is presumed, and the defendant must "promulgate some justification for the restraint even in the absence of detailed market analysis"); *Capital Imaging Assocs. v. Mohawk Valley Medical Assocs., Inc.*, 996 F.2d 537, 546 (2d Cir. 1993) (market power is only a "highly relevant factor in rule of reason cases," and not "the *sine qua non* of antitrust liability"). Still other courts have explicitly divided on this issue. *Compare R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 150-52 (9th Cir. 1989) (en banc) (market power is dispositive in rule of reason cases unless actual anticompetitive effect is shown), *with id.* at 164 (Norris, J., dissenting) ("the Supreme Court has clearly indicated that the 'naked' nature of a restraint is a completely separate reason for avoiding proof of market power"); *and compare Rothery*, 792 F.2d at 217 & n.3 (defendant's collective market share can serve as a dispositive threshold inquiry) *with id.* at 230-32 (Wald, J., concurring) (registering doubt about whether the concept of market power should serve as "the exclusive filtering-out device for all potential violators who do not command a significant market share").

The other component of the Tenth Circuit's market power approach, which is to define market power as the ability of a firm engaging in exclusionary conduct completely to eliminate a competitor from the relevant market, also reflects substantial

disagreement among the lower courts. This restrictive view accords with a similar approach taken by the Seventh Circuit in several recent decisions. *See, e.g., Sanjuan v. American Bd. of Psychiatry & Neurology, Inc.*, 40 F.3d 247, 251 (7th Cir. 1994); *Marrese v. American Academy of Orthopaedic Surgeons*, 706 F.2d 1488, 1495-97 (7th Cir. 1983), *aff'd as modified*, 726 F.2d 1150 (7th Cir. 1984) (en banc), *rev'd on other grounds*, 470 U.S. 373 (1985). It cannot be squared, however, with the decisions of other circuits discussed above.

This case thus presents an ideal opportunity for the Court to clarify both the role and the definition of market power in cases that involve exclusionary practices. As to the role of market power, numerous lower courts have lamented the fact that the Court has not squarely resolved the issue of whether market power should serve as a threshold test. *See, e.g., Capital Imaging*, 996 F.2d at 546 ("The Supreme Court has never explicitly endorsed such a preclusive threshold approach."); *Rothery*, 792 F.2d at 231-32 (Wald, J., concurring) (Supreme Court has not addressed whether "market screen" approach is proper). *See also* T. Jorde & D. Teece, *Rule of Reason Analysis of Horizontal Arrangements*, 61 ANTITRUST L.J. 579, 603 (1993) (Supreme Court "has not yet stated whether" market power should be applied to provide a "safe harbor" for firms whose conduct is challenged under the rule of reason).[3]

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[3] The Court's prior, albeit indirect and inconclusive, consideration of this issue suggests that it views with skepticism the idea that market power should be addressed in isolation at the threshold, without reference to the precise nature and effects of the challenged conduct. *See, e.g., FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460-62 (1986); *NCAA*, 468 U.S. at 108-110; *National Soc'y of Professional Engineers v. United States*, 435 U.S. 679, 692-96 (1978). Indeed, the Court's decisions to date have sanctioned use of the concept of market power to perform such a threshold role only when determining whether a challenged practice should be subjected to *per se* condemnation as opposed to rule of reason analysis. *See, e.g., Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 296-97 (1986).

As to the definition of market power, although the Court from time to time has suggested the relevance of the power to "exclude competition," *see, e.g., Aspen Skiing*, 472 U.S. at 596 n.20; *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956), the Court to date has provided little explanation or guidance to the lower courts on the subject of exclusionary market power. This case presents a proper vehicle for providing such clarifying guidance to the lower courts.

CONCLUSION

For the foregoing reasons, as well as those presented by petitioner, the Petition for a Writ of Certiorari should be granted in this case to review the decision below of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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